IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 767 of 1992

with

CRIMINAL APPEAL No 788 of 1992

with

CRIMINAL APPEAL NO.789 OF 1992

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? No

J

2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?No

5. Whether it is to be circulated to the Civil Judge? No

PRAMOD HARGOVIND DAVE

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 767 & 788 of 1992

MR KS JHAVERI, with Mr.P.M.Thakkar, Sr.Counsel for the appellants.

Mr.Y.F.Mehta, LAPP for Respondent No. 1

2. Criminal AppealNo 788 of 1992

MR BR SHAH with Mr.Budhbhatti for Petitioner
Mr.Y.F.Mehta,Addl.Public PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE
Date of decision: 29/11/96

ORAL JUDGEMENT(Per N.J.Pandya,J.)

These three appeals arise out of a conviction judgment passed by learned Sessions Judge,Mehsana on 5-8-1992. In all there were 10 accused in the said case, of whom, four accused came to be acquitted.

2. Originally, the case was registered as TADA case. But later on, after hearing both the sides, the learned Designated Judge, who happened to be the Sessions Judge also, came to the conclusion that no case under TADA is made out and hence, he decided to treat it as a case under Indian Penal Code and being a Sessions Judge himself, he decided to proceed as per the provisions of Criminal Procedure Code and dealt with the same in that manner.

3. The accused were facing charges under Sec.394 read with Sec.120-B of Indian Penal Code. The complainant Dilipkumar M. Gupta, Cashier of Oriental Bank of Commerce, Unjha on 19-6-1990 had gone to encash a cheque of Rs.12 lakhs to State Bank of India Branch of Unjha accompanied by peon Ijmatkhan Poladi. They went in rickshaw to State Bank of India Branch of Unjha. The cheque was encashed. The money in bundles of currency notes was put in a cash box which the complainant was carrying with him. As it has come out in the deposition of said peon Poladi, after the cash was safely put inside the cash box, he had gone out of SBI Branch of Unjha to call for a Rickshaw for their return journey with money to Orient Bank. The complainant along with his Peon Poladi boarded the rickshaw and it started moving towards Bank. When it travelled at a distance and reached near Abhay Auto shop, from opposite side came a blue coloured jeep and blocked the way of rickshaw. It had to be stopped. Three persons came out of the jeep and they eventually surrounded the rickshaw. One of them, who had a long knife in his hand, asked the complainant to handover the box, which he did not. The person made use of the weapon that he was carrying and as a result, the complainant received injury on his arm, but he did not let go the cash box.

3. Of the remaining two, each one of them had a country made pistol and one of them, on being instigated by one of the three, made use of the country made pistol and fired a shot or two. One of them just passed the eye of the complainant. The use of the fire arm had the desired result upon the complainant so far as the assailant is concerned. He let go the cash box and catching hold of it,all the three boarded the jeep and made good their escape. The complainant got out of the rickshaw and tried to follow it and suspecting some untoward incident a passing by motor van driver also tried to chase the jeep when another shot from a pistol was fired which dissuaded the van driver from pursuing further. The complainant immediately contacted his Bank and his Manager asked him to remain where he was. Within 10 minutes, police party came and the investigation started. At the end of it, as stated above, 10 persons came to be chargesheeted, of whom, six were convicted and awarded 10 years R.I. and fine of Rs.5,000/- and in default RI for 3 years.

4. It may be stated at the outset, that with regard to the alleged conspiracy i.e. Sec.120-B, there is hardly any evidence before us. There is no indication as to where was the conspiracy hatched, by whom it hatched, who masterminded the operation and how did they expect the cashier to go to the Bank with relatively speaking, a cash box of large amount and that too return in a rickshaw with this huge sum when there being an armed guard with the cashier?

5. We find, therefore, considerable substance in the submission of Sr.Counsel Shri Thakkar when he says, according to the deposition of the complainant as well as the said peon Mr.Poladi, that on that day armed guard was on leave, one or two other employees of the Bank were also on leave and the cashier, the complainant, left for the Bank with peon Poladi. It seems that the learned trial Judge has proceeded to invoke Sec.120-B in respect of each of the accused only on the basis that all accused were, according to him, involved in the incident.

6. Unless Sec.120-B is invoked, in our opinion, it would be very difficult to convict all the accused as has been done by the learned trial Judge. Needless to say, the endeavour on the part of the appellants before us is to show that conspiracy apart, even individually looking to the evidence as it stands, none of them could have been convicted, muchless, therefore, there could be a conviction on the basis of Sec.120-B.

7. As it happens in cases under Sec.394 and related offences, the robbers are never known and therefore, the prosecution is definitely hardput to establish their identity. This difficulty would increase many fold when the incident occurs during dark hours of the night. However, this being a matter of banking transaction, it had to be during day hours and it did happen in broad day light. We would therefore expect possibility of identification. According to the prosecution, there was clinching evidence in this regard. We, therefore, now proceed to evaluate this evidence as led before the trial Court. With this end in view, the learned Sr.Counsel Shri Thakkar took us to the evidence of Dilip, the complainant (p.w.3, Exh.97, page 569 of the paper book). Deposition of his companion witness Ismatkhan S.Poladi, p.w.6 Exh.104 page 582, was also read over to us and along with that, evidence of Mahendra Bharti, p.w.19 exh.135 page 626. One more witness who can fall into this category is Ramesh p.w.18, Exh.134 page 625 of the paper book. His evidence is also read over to us. He was the rickshaw driver of that very rickshaw in which the complainant and peon Poladi were returning with cash box containing sum of Rs.12 lakhs to their bank.

8. Whatever incident these witnesses and more particularly, the complainant and said Peon had witnessed was sought to be buttressed by a test identification parade which was carried out in presence of the Executive Magistrate Mr.Buch, p.w.34, Exh.220 page 662. The prosecution has also examined the panch witness, who was present at the time of identification parade and he is one of the two witnesses, namely Ramaji Jotaji p.w.32, Exh.242 page 697. The investigation was carried out by a very high ranking Officer of the State Police. He must have come on the scene, ofcourse, subsequently. But he must have supervised the investigation almost all through out and he is DIG-CID (Crimes) Mr.Z.S.Saiyed, p.w.135 Exh.382 page 932.

9. Looking to the manner in which the incident occurred, admittedly both the witnesses i.e. the complainant and Mr.Poladi were sitting inside the rickshaw and the persons who descended from the jeep, certainly unexpectedly, having succeeded in blocking the way of rickshaw, had come on the passenger side to take away the box. This would necessarily mean, as submitted by learned Sr.Counsel Shri Thakkar that the robbers did have prior information of Bank employee going for bringing cash and coming back in this manner. Somebody must have been keeping watch of the complainant coming

back with the cash box and boarding the rickshaw for going back to their Bank. Otherwise, there was no purpose in coming right in the middle of the road for blocking the path of that rickshaw. The incident did not last for more than 3 to 4 minutes. Under the circumstances, when the complainant and his companion peon both are suddenly surrounded and made to face this unexpected situation and in quick succession, after dagger when fire arm is used and resorted to, in that stressful circumstance and very frightful experience when these witnesses have to identify unknown people so as to bring home charge of robbery against them, their evidence will have to be scrutinised in that background. Needless to say, before the trial Court both the witnesses have maintained that they had seen the incident, they have described it almost in similar terms and about which there is no serious challenge at all from the defence but curiously enough, each one of them has chosen to identify of the three persons only one. The complainant identifies Somaji Amraji Thakore, appellant no.4 and Poladi identifies Navinchandra R.Patel, appellant no.5. So far as the remaining witness Constable Mahendra Bharti is concerned, he has identified Amratbhai Mavji Bhatia, appellant no.2, but that aspect will be dealt with subsequently.

10. Coming back to the testimony of these 2 persons i.e. the complainant and said Peon Poladi, they both admit in the cross examination that except for one accused which they have identified, they are not in a position to identify the remaining two. The Peon further admits in his cross examination that he was terrified and except for the person who was hardly at a distance of half a foot away from him, he could not pay any attention to the remaining two assailants. At the test identificationparade held on 16-8-1990, these witnesses have identified in consistent manner respectively Somaji Amraji by the complainant and Navinchandraji Ranchhod by said Peon Poladi. So far as the Test identification parade is concferned, it is required to be mentioned only for the reasons that it has been carried out and evidence with regard to it was led before the trial Court. The Executive Magistrate, in his deposition, at Exh.220 has elaborately described the manner in which the parade was carried out but the panch witness p.w.43, Exh.242 has clearly stated that by the time he came on the spot as a panch, the line up was already prepared, accused were already standing in it and he had hardly noticed who identified whom. He has simply signed the panchnama. Inspite of this testimony given in almost a casual manner, the learned Prosecutor before the trial Court has

not chosen to seek permission of the learned Presiding Officer to cross examine this witness. This would mean that the prosecution has also accepted the testimony of this witness in its entirity and this would clearly destroy the identification parade upon which the prosecution naturally, under the circumstances, were to rely heavily. The attempt made by the said Executive Magistrate i[s of no avail, because of the witnesses for the purpose particularly the independent witnesses, who are panchas, only one is examined with the aforesaid result.

11. The test identification parade thus having lost its significance, we come back to the substantial evidence of the witnesses, which may or may not sufficient, according to the circumstances of the case. We are not even, for a moment, say that if the witnesses who identify the accused in T.I. Parade have no other supporting material including that of T.I.Parade, no conviction of the accused could be made onthe strength of the testimony of the witnesses who identified them. However, this will naturally depend upon the credibility of their evidence. The evidence of persons who claim to identify the accused, in a matter of like this, will have to be very cautiously and carefully analysed and examined and if there be any weakness or infirmity, the benefit will certainly go to the accused. To begin with, the shaky evidence start from, when naturally they had to admit that they never saw the accused before the incident and we accept the truthfulness displayed by the witnesses in this regard and secondly, except for the Test Identification parade, they would not have had an opportunity of seeing these persons and it having been held after an interval of almost 1 1/2 months, we might even assume for the time being that their memory of the incident was indelibly etched in their brain and at the time of test identification parade, without hesitation, they have identified them. The part displayed as to one person identifying one accused only would cetainly put us on guard. If not fully, some hasty recognision of the remaining two assailants would certainly be there in the mind of each of these important witnesses, but they came to see only one and one only. This shaking in our opinion, is virtually increased to the level of total destruction when we come across the cross examinaiton of said Investigating Officer Shri Saiyed p.w.135 Exh.382 page 932. As per page 948, para 54 onwards, a very meticulous cross examination of these witnesses has been made on behalf of the defence. First it has been put to him that after the incident but before the test

identification parade, in the course of his investigation, he had an occasion not only to interrogate the accused, but had also an occasion to call the said two witnesses, confront them with the accused and seek their identification. The investigating Officer has denied these suggestions made to him on behalf of the defence.

11.A However, in the trial Court record, there was a part of case diary which must have been produced in course of request for remand before the learned JMFC, in one of those case diaries, in that in the course of investigation there is an entry dated 19-7-1990 to the effect that appellants no.4 & 5 were with the Investigating Officer and at that time, said two witnesses--complainant and Poladi were called by the Investigating Officer and they were confronted with these two accused. The entry is to the effect that neither of these witnesses could identify either of the accused.

12. As if this is not enough, so far as that Mahendra Bharti is concerned, he says that he saw jeeps speeding away being driven in a very rash manner and while taking a sharp turn so as to bring the right hand side two wheels above the ground by almost 10' , his attention was drawn towards it and he saw a person sitting next to the driver whom he could identify later on. This he has done at said test identification parade. He has admitted in his cross examination that he had hardly 2-3 seconds to see this unusual manner of driving.

13. The moment an unusual driving is witnessed by anyone, ordinarily attention will be reverted only on vehicle and in addition to which, at best, upon the driver. He does not identify the driver. He simply concentrates on a person sitting next to the driver. After 1 1/2 months, he identifies that person in the test identification parade. That person is present appellant no.2.

14. It has been stated in the cross examination by him that on earlier occasoin he had an opportunity of seeing this very person as the said accused is running an eating place at Unjha. However, the clinching part, so far as this witness is concerned, will be found when we turn to the admission in his statement recorded soon after the incident that he has not claimed to have identified any onein that jeep.

15. The upshot of the matter, therefore, is that the conviction which rests on the identification primarily

with regard to those 3 accused is found to be not wothy of acceptance. The identification done on 16-8-1990 preceded by the said confrontation on 19-7-1990 before the Investigating Officer would certainly take away the rigour of the testimony of the complainant and his companian peon Poladi and so far as Mahendra Bharti is concerned, his evidence has been rendered totally worthless.

16. So far as the remaining accused are concerned, including those 3 accused, there is an additional circumstance namely that of the recovery of the amount. We are told that of the booty of Rs.12 lakhs, almost 10 lakhs and odd has been recovered. However, in the further statement, each of the accused had denied any connection with the amount alleged to have been recovered from them and they have denied the recovery itself. There is nothing to suggest that the currency notes which were recovered were forming part of the said sum of Rs.12 lakhs drawn on 29-6-1990 from State Bank of India in form of bundles of currency notes of various denomination. Once this aspect is taken into consideration, the fact of recovery loses all significance.

17. Under the circumstances, we accept the appeal and hold that the conviction is not maintainable. The appeals are allowed. The conviction is set aside. The accused are ordered to be set at liberty forthwith, if not required for any other prupsose. Fine, if paid, is ordered to be refuned. The bail bonds of those appellants who are on bail, stand cancelled.

17. Ld. APP Mr.Mehta is right in apprehending that if the appeals are allowed, there may be question of return of the muddamal Articles. In this regard, on behalf of the appellants, it has been stated right from thebeginning even before the trial Court that they have nothing to do with the currency notes which are allegedly recovered. The amount is already handed over to the Bank and that point is not agitated before us in the appeal. That order will remain as it is. With regard to the remaining muddamal articles, neither the present appellants are agitating the issue, nor the acquitted accused have come before the Court questioning the order of mudamal in any manner whatsoever. The order of the trial Court so far as disposal of the remaining muddamal articles are concerned, has, therefore, become final. We are, therefore not disturbing it at all. As a result of our decision to allow the appeals, it is the order of conviction alone which has been set aside.

```
****
  f:cr.a76792j
  gmk
     /corrected/
```